No. 04-1052

In The
Supreme Court of the United States

TOWN OF GREAT FALLS, et al.,
Petitioners,
vs.
DARLA KAYE WYNNE,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR THE STATE OF SOUTH CAROLINA AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a legislative prayer at the opening of a municipal council meeting, which concludes with a single invocation to Jesus Christ, violate the Establishment Clause of the First Amendment under the standard articulated in *Marsh v. Chambers*, 463 U.S. 783 (1983)?

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Brief for *Amicus Curiae* in Support Of the Petition for a Writ of Certiorari

The State of South Carolina ("the *amicus"*) respectfully submits this brief, as *amicus curiae*, pursuant to Sup. Ct. R. 37.4 in support of the petition for a writ of certiorari filed in this case by the Town of Great Falls.

Interest of *Amicus Curiae*

The interest of the State of South Carolina in this case is of paramount importance. Virtually from the State's founding to the present day, the General Assembly of South Carolina has opened its daily sessions with prayer. Frequently, such prayers have made reference to or have invoked the name of Jesus Christ. Likewise, much like the Great Falls Town Council, the governing bodies of hundreds of political subdivisions – county and city councils alike – have traditionally begun their meetings with a simple prayer for wisdom and guidance, one which ends with the invocation of Christ's name.

These legislative bodies have, for many years, taken comfort in this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983). *Marsh* upheld the practice of legislative prayer based upon its long history and tradition – a practice which "has coexisted with the principles of disestablishment and religious freedom" for over two centuries. *Id.* at 786. This invariable practice – sanctioned not only by history, but by the understanding of those who founded this country that such practice does not constitute an "establishment" of religion – has thus long served to solemnize legislative deliberations. Absent a showing that the "prayer opportunity has been exploited to proselytize or advance any one, or disparage any other faith or belief," *Marsh* holds that legislative prayer is constitutionally valid. *Id*. at 794-795.

Yet, the Fourth Circuit's decision ignored this centuries-old tradition of legislative prayer in holding that Great Falls' prayer violates the Establishment Clause. The Court of Appeals' ruling is inconsistent with common sense and irreconcilable with this Court's decision in *Marsh*. Using a hypertechnical eye to distinguish *Marsh*, the decision below imposed a *per se* rule of unconstitutionality. The result is that a single mention of Christ's name at the close of a prayer seeking divine guidance and wisdom for the Council's deliberations and decisions violates the Establishment Clause. Such a rule elevates form over substance. It undermines *Marsh's* holding that a legislative prayer practice is valid, unless it proselytizes, advances or disparages a particular religious faith or belief. Great Falls' prayer neither urges adherence to any religious faith, nor *proselytizes* any specific faith or belief, including Christianity. No coercion or attempt to establish a state religion is involved in the Town Council's prayer. Thus, the Great Falls prayer is constitutional.

Clearly, the decision below will adversely affect the legislative prayer practices of legislative bodies throughout South Carolina. Thus, the *amicus* State of South Carolina has an interest in insuring that the Fourth Circuit's error in misconstruing *Marsh* is promptly corrected.

Reasons for Granting the Petition.

Amicus State of South Carolina agrees with Petitioners that the Court should grant *certiorari* to review the decision of the Fourth Circuit. The State of South Carolina fully endorses Petitioners' well-reasoned Petition. We concur that the Fourth Circuit's decision is the latest in a conflict of views among the circuits and other courts concerning *Marsh's* "no proselytization" exception to the validity of a legislative prayer. How that exception is to be interpreted and applied has left the lower courts in a quandary.

As one court stated recently, citing a number of cases as examples, "[l]ower courts both state and federal have struggled to interpret and apply *Marsh* in a consistent fashion, with mixed success." *Simpson v. Chesterfield Co. Bd. of Supervisors*, 292 F.Supp. 2d 805, 813 (E.D. Va. 2003). Legislative prayer is a tradition which is exercised virtually every day, in state capitols and county and city council chambers all over this country. Thus, this Court should now clear up the confusion and uncertainty among lower courts regarding *Marsh's* limits.

One Judge of the Court of Appeals for the Sixth Circuit has read *Marsh* in a different context, much as we do here, commenting that prayers to open sessions of the United States Senate which allude to Christ "pass constitutional muster according to *Marsh*." *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1416, n. 9 (6th Cir. 1987) (Wellford, J., dissenting). Based upon *Marsh*, Judge Wellford would have upheld the commencement prayers at issue in the case before him. In his view "[t]he mention of the Deity, even in the Christian context" does not undermine "the constitutional practices of the Senate chaplain." Thus, Judge Wellford believed *Marsh* permits a reference to Christ as part of a legislative prayer.

Likewise, the Tenth Circuit *en banc* decision in *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) interprets *Marsh* as standing for a rule that legislative prayer which "evokes a particular concept of God is not enough to run afoul of the Establishment Clause." Instead, according to the Tenth Circuit, the Establishment Clause, as applied by *Marsh*, only prohibits "... a more aggressive form of advancement, i.e. proselytization." *Id*. at 1234, n. 10.

Notwithstanding these views, the Fourth Circuit has now drawn an artificial line between "proselytizing" and "advancing" a specific faith or belief, concluding that *Marsh* allows only "nonsectarian" prayers. Thus, in the eyes of the Fourth Circuit,

Marsh dictates that no mention whatever of any specific deity may be made, consistent with the Establishment Clause. As the Court in *Newdow v. Bush*, ___ F.Supp.2d ___, 2005 WL 81120 (D.D.C. 2005) recently observed, the Fourth Circuit decision in this case places that circuit at loggerheads with the Tenth Circuit's decision in *Snyder*.

Even a third point of view regarding *Marsh's* meaning has been expressed by Judge Briscoe in his dissent in *Snyder*. Judge Briscoe views *Marsh's* limitation as speaking only to whether the entire prayer practice demonstrates an "impermissible motive." Such an unconstitutional motive, Judge Briscoe believes, may not be gleaned from the content of the prayer alone, but must be gathered from all facts and circumstances surrounding the prayer practice. As Judge Briscoe puts it, "*Marsh* provides [that] prayer content is simply not an issue for the federal judiciary unless a claim is made that an entire practice of legislative prayer has been 'exploited to proselytize any one or to disparage any other faith or belief.'" 159 F.3d at 1247 (Briscoe, J., dissenting).

Unless *Marsh* is clarified once and for all, the confusion surrounding the decision's meaning and the limitations which *Marsh* established will thus inevitably chill legislative prayer practices, not only in the Fourth Circuit, but everywhere. If the Fourth Circuit is correct in its interpretation of *Marsh*, and the other authorities referenced herein are incorrect, legislative bodies need to know that. If *Marsh's* conclusion is dependent upon and limited by the fact that the Nebraska Chaplain in that specific case removed all references to "Christ," as the Fourth Circuit held, state and local legislative bodies, as well as Congress, need to know that. However, if the Fourth Circuit erred, and this Court leaves its decision in place, important First Amendment rights of free speech and free exercise of religion will be greatly inhibited.

We urge that *certiorari* is particularly appropriate where, as here, there is not only considerable confusion and conflict

among the circuits and other courts, but an asserted misreading of a decision of this Court. See, *e.g. Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) [*certiorari* granted because "... the Ninth Circuit's holding is in direct conflict with out precedents ...."]; *Mabry v. Johnson*, 467 U.S. 504, 506-507 (1984) [*certiorari* granted because "... of a conflict in the Circuits, ... coupled with our concern that an important constitutional question has been wrongly decided ...."]; *Scott v. Illinois*, 440 U.S. 367, 368 (1979) [*certiorari* granted "... to resolve a conflict among state and federal lower courts regarding the proper application of our decision in *Argersinger v. Hamlin*, 407 U.S. 25 ... (1972)"]. See also, *Gonzaga University v. Doe,* 536 U.S. 273 (2002) [fact that courts are divided as to the meaning of Supreme Court's decisions, warrants review by the Supreme Court].

Marsh v. Chambers

Marsh concluded that the delegates to the Constitutional Convention "did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view.'" 463 U.S. at 792. The Supreme Court's conclusion is based upon the "unique history" of a practice "deeply embedded in the ... tradition of this country." *Id*. at 786, 791. As a result, *Marsh* instructed that courts may not "embark on a sensitive evaluation or parse the content of a particular prayer." *Id.* at 794-5. So long as "the prayer opportunity" has not been "exploited to proselytize or advance any one, or to disparage any other faith or belief," *Marsh* mandates that a legislative prayer is constitutionally valid. It is important to remember here that a legislative prayer for Divine guidance is already constitutionally acceptable under *Marsh*.

The question raised by this case is the specific content of the prayer used by Great Falls Town Council. We submit that *Marsh's* holding – that a legislative prayer "for Divine guidance ... is not an 'establishment' of religion or a step toward

establishment" – forecloses the kind of judicial parsing of the Town's prayer which the Fourth Circuit undertook. If a prayer for "Divine guidance" does not violate the Establishment Clause, as *Marsh* commanded, without more, neither does the mere mention of a "specific Deity."

Fourth Circuit Decision

In this case, *Wynne v. Town of Great Falls, et al*., 376 F.3d 292 (4th Cir., 2004), the Court of Appeals for the Fourth Circuit held that "[t]he invocations at issue here, which specifically call upon Jesus Christ, are simply not constitutionally acceptable legislative prayer like that approved in *Marsh*. Rather, they embody the precise kind of 'advance[ment] of one particular religion that *Marsh* cautioned against." 376 F.3d at 301-302. The Court distinguished *Marsh's* use of the word "advance" from the word "proselytize" for purposes of this Court's statement in *Marsh* that the practice of legislative prayer will withstand Establishment Clause scrutiny so long as "there is no indication that the prayer opportunity has been exploited to *proselytize* or *advance* any one, or to disparage any other faith or belief." 463 U.S. at 794-795 (emphasis added). As a result, the Fourth Circuit found that "[t]he prayers challenged here stand in sharp contrast" to the "nonsectarian" prayers approved in *Marsh*. 376 F.3d at 298.

The Fourth Circuit attached particular significance to this Court's use of the word "or" preceding the word "advance" and thus concluded that "'proselytize' and 'advance' have different meanings and denote different activities." *Id*. at 300. According to the Court of Appeals, while a single reference to "Jesus Christ" in a legislative prayer may not equal "proselyti[zation]," it does represent "advance[ment]," and is thus contrary to *Marsh*. Moreover, the Court relied upon this Court's decision in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), a case not involving legislative prayer. The Fourth Circuit concluded that *Allegheny* had "clarified" *Marsh*, finding that this

Court had upheld the legislative prayer in *Marsh* only because the Nebraska chaplain had removed all references to Christ, and therefore the prayer in *Marsh* was nonsectarian. See, 376 F.3d at 299 (quoting *Allegheny*, *Id*. at 603, which quotes *Marsh*, 463 U.S. at 793, n. 14). Thus, in the opinion of the Fourth Circuit, a single reference to Christ "clearly 'advance[d] one faith, Christianity, in preference to others, in a manner decidedly inconsistent with *Marsh*." *Id*. at 301. The Fourth Circuit rejected any argument that its word-by-word review of the Great Falls prayer "engaged in any ... 'parsing'" on its part. *Id*. at 298, n. 4.

Summary of Argument

Amicus believes that the Fourth Circuit made a number of errors in its interpretation and application of *Marsh*. First and foremost, we would urge that the Fourth Circuit's reading of *Marsh* to require any distinction between "proselytization" and "advancement" of a specific faith or belief was not intended by this Court and is without foundation. *Marsh* does not hold that a single reference to Christ in a legislative prayer, which has the secular purpose of seeking wisdom and guidance in Council's deliberations and actions, is an exploitation of the prayer opportunity "to proselytize or advance ... any one faith or belief." Here, the Council's prayer principally concerns that body's appreciation of the difficulties in its task ahead, its plea for open-mindedness among its members; and a desire of council to serve the public good – goals which *Marsh* recognizes have been aspired to by every legislative body which has sought Divine guidance since this country was established. *Marsh*, 463 U.S. at 792. [To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances an "establishment" of religion ...."].

Secondly, absent such proselytization, the Fourth Circuit's decision contravenes *Marsh's* mandate that judges may not engage in a "parsing" of legislative prayer. As Judge Briscoe

warned in his dissent in *Snyder*, review of the content of a specific legislative prayer "is simply not an issue for the federal judiciary ...," absent proselytization. 159 F.3d at 1247. (Briscoe, J., dissenting)

Third, *Marsh* does not depend upon the complete absence of any reference to Christ in a legislative prayer in order to uphold the prayer as consistent with the Establishment Clause. The Fourth Circuit Court of Appeals was incorrect in its reliance upon *Marsh's* footnote 14 (463 U.S. at 793) regarding Chaplain Palmer's removal of any reference to Christ. Likewise, the Fourth Circuit was wrong in placing such emphasis upon *Allegheny's* statement made in another context concerning that footnote. Any conclusion that *Marsh* depended upon a footnote for its holding, or that *Marsh* concluded that no reference to Christ whatsoever may be made as part of a legislative prayer, misconstrues *Marsh* and is inconsistent even with the understanding of dissenting Justices in that case. See, 463 U.S. at 823 (Stevens, J., dissenting); *Id*. at 818, n. 38 (Brennan and Marshall JJ., dissenting).

Fourth and finally, the Fourth Circuit's decision disregards the historical foundation upon which this Court so firmly rested the *Marsh* decision. The Court's conclusion was founded upon the longstanding and uninterrupted historical practice of legislative prayer, particularly the practice of the same First Congress which drafted and sent to the states for ratification the First Amendment.

Yet, the Fourth Circuit decision took no cognizance of the undisputed fact that prayers invoked by the First Congress, and virtually every Congress and legislative body thereafter, ended by invoking the name of Jesus Christ. As the Court held in *Marsh*, legislative prayer does not violate the Establishment Clause because the Founding Fathers in the First Congress and subsequent legislative bodies did not consider such practice to be

an "establishment" of religion, but a "tolerable acknowledgement of beliefs widely held among the people of this country." 463 U.S. at 792. Thus, if *Marsh* mandates that the "unique history" of legislative prayer renders such prayer constitutionally acceptable, it is illogical and unhistorical to conclude that Great Falls Town Council's prayers – virtually identical to those invoked by the Founding Fathers in the First Congress – are constitutionally unacceptable. If history is the basis of upholding legislative prayer, that history should be fully honored.

In short, the Fourth Circuit, unlike the Tenth Circuit, misread *Marsh*. By concluding that *Marsh* required that legislative prayer must remain completely "nonsectarian" in order to pass constitutional muster, the Fourth Circuit disregarded this Court's boundaries for permissible legislative prayer delineated in *Marsh*. Unless a legislative prayer "... proselytizes a particular tenet or belief, or ... aggressively advocates a specific religious creed, or ... derogates another religious faith or doctrine," it meets the *Marsh* test. *Snyder, supra* 159 F.3d at 1234. However, the Fourth Circuit's decision in this case has now established new boundaries of its own, much more stringent and inflexible than those required by *Marsh*. As of now, only legislative prayers made to a "generic deity" are valid under the Establishment Clause. Such an application of *Marsh* is unfaithful to this Court's decision.

Argument

The Fourth Circuit's distinction between "proselytization" and "advancement" of a specific faith or belief was not intended by this Court and such a distinction is thus erroneous. While it is true that the Court's language states that "the prayer opportunity" may not be "exploited to proselytize *or* advance any one, or to disparage any other faith or belief," the Court of Appeals' undue reliance upon the word "or" in this sentence is overly literal and misplaced. (emphasis added). Although "or" often is used to

indicate the disjunctive, this Court has, in other contexts, cautioned against too literal a reliance upon that word. See, *De Sylva v. Ballentine*, 351 U.S. 570, 573 (1956) ["the word 'or' is often used as a careless substitute for the word 'and'; ... it is often used in phrases where 'and' would express the thought with greater clarity ...."].

As noted above, in *Snyder*, *supra*, the Tenth Circuit attached no significance to *Marsh's* use of the word "or," concluding that "advancement" for purposes of a violation of the Establishment Clause "is a more aggressive form of advancement, i.e. proselytization." 159 F.3d, *Id.*, at 1234, n. 10. Such a reading of *Marsh* leaves the flexibility to legislative bodies which a reasonable interpretation of the Establishment Clause requires. Indeed, *Marsh* observed that the delegates to the Constitutional Convention "did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view.'" 463 U.S. at 792. Thus, *Marsh* seems to reject the hypertechnical distinction made by the Fourth Circuit. If the *Marsh* Court had thought only "nonsectarian" prayers were constitutional, the Court would not have placed such reliance upon the prayer practices of the Founding Fathers or the First Congress; the Court, almost certainly, was well aware that such prayers often invoked the name of Jesus Christ. It is thus illogical to conclude that this Court would have so heavily relied upon history to validate the practice of legislative prayer, yet completely denied history with regard to the invocation of Christ's name as part of that historic practice.

Nor would the Court have stated so clearly that courts may not "parse the content of a particular prayer." *Id.* at 794-795. If any reference whatever to Jesus Christ had been forbidden by *Marsh's* use of the word "advance," as the Fourth Circuit held, the *Marsh* Court would not have discouraged the "parsing" of the content a prayer, but instead would have welcomed it. In the

event that the Fourth Circuit's reading of *Marsh* is correct, every legislative prayer must now be carefully screened by the judiciary to insure that it is completely "nonsectarian" or that the prayer does not make an unconstitutional reference to a "specific deity." In our view, however, this Court in *Marsh* refused to impose that kind of judicial oversight over legislative bodies. Likewise, *Marsh* eschewed a *per se* rule – one which rigidly insists that any mention of Christ in a legislative prayer constitutes unconstitutional "advancement" of religion – which the Fourth Circuit here directed. To the contrary, *Marsh* fashioned a rule that legislative prayer is to be upheld, unless the prayer opportunity is being used to proselytize or disparage a specific faith or belief.

This Court's decision in *Lynch v. Donnelly,* 465 U.S. 668 (1985) confirms our view. *Lynch*, of course, involved a Christmas display which included several secular objects as well as a creche. In a plurality opinion, the Court concluded that no Establishment Clause violation occurred even though "the display advances religion in a sense ...." 465 U.S. at 682. The Court emphasized – contrary to the Fourth Circuit's conclusion in this case – that "no fixed *per se* rule can be framed" in any Establishment Clause case. *Id*. at 678. What is important, *Lynch* concluded, is not to "mechanically invalidat[e] all governmental conduct ... that confers benefits or give special recognition to religion in general *or to one faith* – as an absolutist approach would dictate ...." (emphasis added). Instead, the Court must determine whether "official conduct ... in reality ... establishes a religion or religious faith, or tends to do so." *Id*.

In *Lynch*, the Court noted that the presence of the creche as part of the display "advances religion in a sense...," 465 U.S. at 682. In its entirety, however, the display possessed a secular purpose – to "celebrate the [Christmas] Holiday and to depict the origins of that holiday." *Id*. at 679. Likewise, the creche was not an "advancement" of one faith in any unconstitutional sense. In the *Lynch* Court's view, "whatever benefit to one faith or religion

or to all religions is indirect, remote and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass ....'" *Id*. at 683. Thus, the fact that an overtly Christian symbol was part of a secular display did not automatically render that display an "advancement" of religion so as to invalidate Pawtucket's actions under the Establishment Clause. This Court reminded us in *Lynch* that it refuses "'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*.'" at *Id*. at 678 (quoting *Waltz v. Tax Comm*., 397 U.S. 664, 671 (1970)). (emphasis in original). So too should be the analysis in this case, thus rejecting the inflexible *per se* standard imposed by the Fourth Circuit.

Importantly, *Lynch* also confirmed that the prayer in *Marsh* was "... identified with one religious faith ...." *Id*. at 685. The *Lynch* Court thus relied heavily upon *Marsh* to support its decision that the Christmas display was valid. *Lynch* concluded that "[t]o forbid the use of this one passive symbol – the creche – ... while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction to our history and our holdings." *Id*. at 685-86.

Based upon *Marsh*, the decision in *Lynch* demonstrates that reference to a Christian symbol, when viewed in the context of an activity or celebration secular in nature, does not constitute "advancement" of religion in violation of the Establishment Clause any more than does legislative prayer. See also, *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch*, 465 U.S. at 678) ["government may not coerce or otherwise act in a way which 'establishes a [state] religion or religious faith or tends to do so.'"]; *Allegheny, supra*, 492 U.S. at 659-60 (Kennedy, J., concurring in judgment in part and dissenting in part) ["... it would be difficult to establish a religion without some measure of coercion, be it in the form of taxation to supply a state-established

faith, direct compulsion to observance or governmental exhortation to religiosity that amounts to proselytizing."] Thus, *Lynch*, when read in conjunction with *Marsh*, leads inevitably to the conclusion that, absent proselytization or coercion on the part of the Town Council, the legislative prayer in question in this case does not contravene the Establishment Clause.

Likewise, a leading constitutional scholar has recently interpreted *Marsh* as imposing a "no proselytization" test in accordance with his reading of *Marsh*. See, G. Sidney Buchanan, "Prayer in Governmental Institutions: The Who, The What, and the At Which Level," 74 *Temple Law Review* 299, 349 (Summer, 2001). Professor Buchanan comments that the *Marsh* test contains two prongs: a prayer "that does not urge adherence or lack of adherence to any religious faith" and one which does not proselytize on behalf of "a particular faith or belief." He concludes that, pursuant to this standard, "a prayer asking that those present 'accept Christianity as the one true faith' would be a proselytizing prayer, while a prayer asking 'God's blessing on the work of this council' would not be a proselytizing prayer."

References to Jesus Christ or other religious deities, Professor Buchanan writes, would not necessarily be unconstitutional. While he notes that lower courts are somewhat uncertain regarding this issue, a "bright-line" rule striking down any legislative prayer which refers to leaders of particular religious faiths "might well be too rigid ...." *Id*. at 351. He states that "[v]iewed in totality, the basic test appears to be: Does the challenged prayer urge adherence or lack of adherence to any religious sect or faith .... Under this test, a prayer that 'merely' asks for the 'good' or 'wise' resolution of secular conditions and issues would normally not be a proselytizing prayer." *Id*. at 349.

With respect to the second prong – proselytization of a particular faith or belief – Professor Buchanan is of the view that *Marsh* holds that "a prayer that proselytizes for wisdom,

tolerance, or reconciliation in the resolution of secular conditions and issues would be permissible unless the prayer indicates that such wisdom, tolerance or reconciliation can be achieved more readily through adherence (or non-adherence) to a particular faith or belief." *Id*. at 350. Accordingly, Professor Buchanan's reading of *Marsh* is consistent with ours and does not impose a *per se* rule that a specific deity may not be referenced as part of a legislative prayer. So long as the prayer does not proselytize on behalf of a specific faith or belief, it falls within the protection set forth by this Court in *Marsh*. Here, the Great Falls prayer seeks wisdom, open-mindedness and the ability of the Council to do a good job. It does not proselytize on behalf of a specific faith or belief. Thus, it is valid under *Marsh*.

Furthermore, the Fourth Circuit's considerable reliance upon *Allegheny* which, in turn, referenced *Marsh's* footnote 14 regarding the Nebraska Chaplain's removal of references to Christ, is also misplaced. *Allegheny* deemed the creche display in that case to constitute a violation of the Establishment Clause because, unlike *Lynch*, "... nothing in the context of the display detracts from the creche's religious message." 492 U.S. at 598. Legislative prayer, and thus the Great Falls prayer is far different, however. As Justice O'Connor explained in *Lynch*, such prayers are "government acknowledgements of religion" which serve "the legitimate secular purpose of solemnizing public occasions ...." 465 U.S. at 692-693 (O'Connor, J., concurring). Moreover, unlike the creche situation in *Allegheny*, which clearly focused exclusively upon the symbol of a single religion, the legislative prayer in *Marsh*, as well as the Christmas display in *Lynch* involved situations in which "'reason or effect merely happens to coincide or harmonize with the tenets of some ... religions.'" *Lynch, supra* at 682, citing *Marsh* and quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). Moreover, legislative prayer is "[n]oncoercive government action within the realm of flexible accommodation or passive acknowledgement" and thus "... does not violate the Establishment Clause unless it benefits

religion in a way more direct and substantial than practices that are accepted in our national heritage." *Allegheny*, 492 U.S. at 662-663 (Kennedy, J, concurring in the judgment in part and dissenting in part).

Consequently, any comment regarding *Marsh* in *Allegheny* is *dicta*. Surely, the Court did not seek to revisit the issue of legislative prayer in a case in which that issue was not squarely before the Court. Almost certainly, the Court in a subsequent case did not seek to overturn the historical underpinnings upon which legislative prayer is based. Indicative of this is the fact that this Court, in *Allegheny*, delineated clear differences between legislative prayer, which "does not urge citizens to engage in religious practices," and unconstitutional situations involving "exhortation from government to the people that they engage in religious conduct." 492 U.S. at 603, n. 52.

Thus, it is evident that, as far as this Court is concerned, there is a clear distinction between legislative prayer, which is almost always non-proselytizing and non-coercive, and other situations, which may well "present a realistic risk of establishment." *Allegheny*, *Id.*, at 662. Moreover, *Marsh's* footnote 14 is not controlling. If it were, *Lynch* would not have placed such considerable reliance upon *Marsh*. As one commentator has noted, *Marsh's* footnote "appears to be merely background information and not a standard that must be followed to pass *Marsh* analysis in an establishment clause challenge." Serra, Note, 65 *University of Detroit Law Review* 769, 798, n. 230 (1988). In short, *Allegheny* is an entirely different case and does not undermine or narrow this Court's holding in *Marsh*.

Finally, there is no doubt that the legislative prayers invoked as part of the proceedings of the First Congress contained references to Jesus Christ. Bishop William White, the second Chaplain of the United States Senate, was chosen as Senate Chaplin in 1790, (see, www.senate.gov/artandhistory/common/

briefing/Senate_Chaplain.htm); years later, he reflected upon his practice as Senate chaplain in a letter to Rev. Henry V. D. Johns, as follows:

> [m]y practice, in the presence of each house of congress, was in the following series: the Lord's prayer; the collect Ash Wednesday; that for peace; that for grace; the prayer for the President of the United States; the prayer for Congress; the prayer for all conditions of men; the general thanksgiving; St. Chrysostom's Prayer; *the grace of the Lord Jesus Christ, etc*.

Wilson, *Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episcopal Church of the State of Pennsylvania* (1939), p. 322 (Letter to the Reverend Henry D. Johns, December 29, 1830). Thus, it is clear, based upon the reflections of someone present as Senate Chaplain in the very first years of the Nation's founding, that invocations to Christ's name were part and parcel of the legislative prayers rendered in the First Congress – the legislative body to which *Marsh* attached great historical significance.

In addition, it is also evident that the Inauguration of President George Washington, on April 30, 1789, included a prayer service in which both houses of Congress were duly assembled and which were conducted by Senate Chaplain Samuel Provoost. As has been well documented, both the Senate and House of the First Congress mandated that "members of the Senate and House of Representatives, proceed to St. Paul's Chapel to hear divine service to be performed by the Chaplain of the Congress already appointed." Stokes, *Church and State in the United States*, I:485. Further, as Mr. Stokes has noted, "this was not a service provided by an Episcopal church to which senators and representatives were invited, but an official service carefully arranged for by both houses of Congress and conducted by their

duly elected chaplain, who happened to be the bishop of the Episcopal diocese of New York." *Id*.

Bishop Provoost "... read prayers from the Book of Common Prayer" in accordance with Congress' directive to conduct a "Divine Service." Epstein, "Rethinking the Constitutionality of Ceremonial Deism," 96 *Colum. Law Review* 2083, 2108 (December, 1996). Examination of the version of the Book of Common Prayer in use at that time reveals that all prayers therein reference "Jesus Christ." This is, therefore, further documentation, in addition to Chaplain White's recounting, that in the very same Congress which approved the First Amendment for ratification, Congress also required that prayers, which specifically mentioned "Jesus Christ" and other Christian symbols, were to be delivered at an official ceremony in which both houses of Congress participated.

This historical record is particularly telling. *Marsh* upheld legislative prayer based upon the longstanding legislative history of the practice – particularly the actions of the First Congress. This was the same Congress which sent the First Amendment to the states for ratification. 463 U.S. at 790. Herein, we present to the Court demonstrable documentation in the historic record that the Chaplains who were appointed by that First Congress made reference to "Jesus Christ" as part of their legislative prayers in much the same way as the Town of Great Falls did in its prayer. The fact that the "men who wrote the First Amendment Religion Clause," 463 U.S. at 788, made reference to "Christ" in a non-proselytizing manner, should thus serve to uphold the Great Falls prayer under the clear analysis employed by this Court in *Marsh*.

Accordingly, we urge this Court to grant *certiorari* in this case. *Marsh v. Chambers* upholds legislative prayer except in a very narrow set of circumstances – where the "prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other faith or belief." Rather than a *per se* rule of

unconstitutionality, *Marsh* virtually presumes legislative prayer to be valid. Yet, the Fourth Circuit has now re-interpreted *Marsh* to create a far different standard for the constitutional validity of legislative prayer than was first enunciated by this Court in *Marsh*. The Fourth Circuit has resurrected a portion of the test used in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as applied to legislative prayer – a test which this Court rejected in *Marsh* – to strike down a legislative prayer which *Marsh* would have upheld as one which the Founding Fathers did not view as an "establishment" of religion. The result of the Fourth Circuit's error is that legislative prayer is now subject to an absolutist, *per se* standard of constitutional scrutiny, one which invites the kind of "parsing" of legislative prayers which *Marsh* warned against. Now, the mere use of "one forbidden word" by a legislative body in its legislative prayer violates the Constitution. We trust this Court, in deciding *Marsh*, did not intend such a result.

The legislative prayer used by the Town Council here is little different from those employed by the First Congress and by legislative bodies for over two centuries. References to Christ and Christianity were part and parcel of the same historic legislative prayer practice which was approved in *Marsh*. To separate these references from the practice of legislative prayer ignores the very history upon which *Marsh* was based. If *Marsh's* reliance upon the history of legislative prayer is to retain any viability whatever, the fact that Great Falls Town Council is following the same prayer practices used by legislative bodies throughout our history must thus be honored.

It is the position of the State of South Carolina that *Marsh* does not render invalid a legislative prayer because that prayer contains a single reference to the name of Jesus Christ as part of a prayer for the Council's wisdom and effectiveness in conducting its affairs. Such a prayer serves a secular purpose, does not proselytize on behalf of the Christian religion and does not disparage any other faith or belief. Furthermore, such a prayer is

not coercive because "[t]he atmosphere at the opening session of ... [a legislative body] where adults are free to enter and leave with little comment ...." insures such non-coercion. *Lee v. Weisman*, *supra*, 505 U.S. at 597. Great Falls' prayer comports with *Marsh's* requirements, and it is thus consistent with the Establishment Clause. Accordingly, the Fourth Circuit may not parse the content of the Great Falls prayer as it did here by imposing a *per se* rule of unconstitutionality.

In summary, *Marsh* and more than two hundred years of history involving legislative prayer warrants the grant of *certiorari* in this case. Great Falls "has the power to open its meetings" with legislative prayers which our nation for over two centuries "has come to see as 'tolerable.'" *Snyder, supra*. From the Continental Congress and Inauguration of George Washington, to the First Congress, to the present day, the legislative prayer practice has been unaltered and unbroken. References to Christ and other Christian symbols have not been considered an "establishment" of religion, but rather a commonplace and constitutional tradition for solemnizing the serious work of legislative bodies everywhere in this country.

Conclusion

The petition for writ of certiorari should be granted, and the decision of the Court of Appeals reversed.

Respectfully submitted,

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